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Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar—Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)

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ASYLUM FOR PERSECUTED SOCIAL GROUPS: A CLOSED DOOR LEFT SLIGHTLY AJAR—*Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)

With the passage of the Refugee Act of 1980,[1] the United States took an important step toward fulfilling its international human rights obligations.[2] The Act significantly changed American asylum law and the federal courts have played a major role in interpreting the resulting changes.[3] Because of this, the courts often have the last word in determining the practical nature of the human rights commitments embodied in the Refugee Act.[4] In *Sanchez-Trujillo v. INS*,[5] the Ninth Circuit Court of Appeals[6] played the role of interpreter in outlining the parameters of a "particular social group" subject to a well-founded fear of persecution. Membership in a social group of this type allows an alien to fall within the Refugee Act's definition of a refugee eligible for asylum.[7] The *Sanchez-Trujillo* court held that young, urban, working class Salvadoran males of military age (eighteen to thirty) who had not joined the armed forces and had not expressed overt support for the Salvadoran government were not cognizable as a particular social group.[8]

Although the immediate outcome of the decision may not reflect the spirit of United States obligations under the Refugee Act, part of the court's

1. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. §§ 1101(a)(42), 1157–1159, 1253(h), 1521–1524 (1982) (amending Immigration and Nationality Act §§ 101(a)(42), 207–209, 243(h), 411–414) [hereinafter INA]).

2. The Act amended the INA to reflect United States obligations under the United Nations Protocol on the Status of Refugees. Congress ratified the Protocol in 1968. *See infra* notes 11–31.

3. *See generally* Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327 (1986).

4. *See, e.g.*, INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987); INS v. Stevic, 467 U.S. 407 (1984).

5. 801 F.2d 1571 (9th Cir. 1986).

6. As with other aspects of American asylum law, the Ninth Circuit has generated a significant portion of these opinions owing to, in large part, the sobering numbers of Central American refugees entering the United States and being apprehended in the Ninth Circuit's jurisdiction. *See generally* Blum, *supra* note 3. It is estimated that over 500,000 Salvadorans have entered the United States since October 1979. *See, e.g.*, Pastor Ridruejo, *Report on the Conditions of Human Rights in El Salvador*, U.N. Doc. E/CN.4/1984/25 (1984). The exact number of any population of undocumented aliens is, of course, open to speculation. *See generally* T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 756–61 (1985).

7. The Refugee Act defines a "refugee," as relevant to this discussion, as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(42)(A), 8 U.S.C. § 1101(42)(A) (1982).

8. Sanchez-Trujillo v. INS, 801 F.2d at 1577.

opinion has the potential for allowing greater recognition of the social group category in the future. The court developed a four-part test for evaluating a social group claim which, if used in a balanced fashion, is capable of producing a fair result.[9] The court's use of the test, however, was not balanced. In determining the cognizability of the social group—the first step of the four-part test—the court used too narrow a standard. This standard bears little relation to the underlying purpose of determining refugee status.[10]

A review of international and municipal law concerning refugees and the cognizability of social groups reveals a different notion of what is meant by the term "social group." This Note evaluates *Sanchez-Trujillo* by reviewing these bodies of law, as well as by probing conflicts within the decision itself. In conclusion, this Note proposes a modification of the *Sanchez-Trujillo* test, making it a more appropriate standard for identifying a "particular social group" for refugee purposes.

I. BACKGROUND: THE REFUGEE ACT OF 1980 AND ITS RELATION TO THE UNITED NATIONS CONVENTION AND PROTOCOL

The Refugee Act of 1980[11] amended the Immigration and Nationality Act (INA)[12] to bring United States immigration law into compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.[13] The Protocol itself updates the U.N. Convention Relating to the Status of Refugees of 1951.[14] Two aspects of the Convention and Protocol are central to the process of granting asylum and recognition of refugee status: the universal definition of "refugee" and the principle of *non-refoulement*.

9. The four steps are: One, the identification of a cognizable group; two, showing that the asylum applicant is a group member; three, proof that persecution is aimed at one of the group's unifying characteristics; and four, the presence of "special circumstances" that merit the recognition of a solely group-based claim. *Sanchez-Trujillo*, 801 F.2d at 1574. The test is discussed in detail in the text accompanying notes 56–57.

10. The court used a standard more useful in identifying social groups on the jury venire. *See infra* notes 137–40 and accompanying text.

11. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. §§ 1101(a)(42), 1157–1159, 1253(h) 1521–1524 (1982)).

12. 8 U.S.C. §§ 1101–1524 (1982).

13. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol]; *see infra* note 17 and accompanying text. Congress ratified the Protocol in 1968. 114 CONG. REC. 29,607 (1968). *See generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

14. 189 U.N.T.S. 137., U.N. Doc. A/CONF.2/108 (1951) [hereinafter Convention]. The United States is party to the Protocol, but not the Convention. *See* MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES, TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 151, 521 (1982).

A. *The Universal Definition of "Refugee"*

The U.N. Convention defines a refugee as any person who,

> [a]s a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of [sic] a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.[15]

The Protocol amended this definition by deleting the words "As a result of events occurring before 1 January 1951 and . . ." and the words " . . . as a result of such events."[16] The Refugee Act incorporates the Protocol's amended definition of "refugee" into United States immigration law.[17]

The definition of "refugee" provides the foundation for asylum procedure in INA section 208.[18] Under this section, an alien can qualify for a discretionary grant of asylum if he or she meets the "refugee" definition.[19] An application for asylum is weighed by the "well-founded fear" standard, which comes directly from the definition.[20] Generally, the applicant must show some objective ("well-founded") basis for his or her subjective fear of persecution on account of one or more of the five statutory factors: race, religion, nationality, membership in a social group, and political opinion.[21]

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15. Convention, *supra* note 14, art. 1 § A(2).

16. Protocol, *supra* note 13, art. I, para. 2. The Protocol did not rewrite the definition of "refugee," it merely stated the passages to be eliminated in the Convention definition. The Protocol also eliminated an optional limitation which, under the Convention, allowed contracting States to limit their obligation to refugees from European countries. For further discussion of these time and geographic limitations in the Convention, see *infra* notes 82–88 and accompanying text.

17. INA § 201(a), 8 U.S.C. § 1101(a)(42) (1982); *see, e.g.*, 126 CONG. REC. 3,757 (1980) ("The new definition makes our law conform to the United Nations Convention and Protocol . . . ."); S. REP. No. 256, 96th Cong., 1st Sess. (1979); 125 CONG. REC. 23,321 (1979).

18. Section 208 applies to refugees found within United States borders. Other parts of the INA, sections 101(a)(42)(B), 207, and 209, set out the overseas refugee program. 8 U.S.C. §§ 111(a)(42)(B), 1157, 1159 (1982). The overseas program also incorporates the United Nations definition, but does not require that the refugee be outside of his or her country of nationality or habitual residence. *See* 8 U.S.C. § 1101(42)(B) (1982).

19. The discretionary grant of asylum essentially puts the final decision in the hands of the Attorney General and the INS. This decision is influenced by "advisory letters" from the State Department concerning, among other things, the political status of the alien's country of origin. For a fuller explanation of asylum granting procedures, see generally T. ALEINIKOFF & D. MARTIN, *supra* note 6 at 638–726; Blum, *supra* note 3; Botelho, *Membership in a Social Group: Salvadoran Refugees and the 1980 Refugee Act*, 8 HASTINGS INT'L & COMP. L. REV. 305 (1985).

20. *See supra* note 7.

21. INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987).

The asylum determination, then, partly involves the subjective state of mind of the applicant.[22] Courts have stressed an individual basis for this fear;[23] mere membership in a persecuted group is usually not sufficient to result in the recognition of a well-founded fear.[24]

B. Non-Refoulement

The second important aspect of the Convention is the principle of *non-refoulement*. This principle prohibits a government from returning individuals to a country where their lives or freedom would be in danger due to any of the five factors mentioned above.[25] The Refugee Act amended the INA to include *non-refoulement* in section 243(h).[26] Section 243(h) now mandates a withholding of deportation if the Attorney General finds that an alien's "life or freedom would be threatened" on account of one or more of the five statutory factors.[27] Withholding of deportation is mandatory if the alien meets the burden of proof.[28] This burden is distinct from that of the "well-founded fear" standard.[29] The alien must show a "clear probability of persecution": that it is more likely than not the alien as an individual will be persecuted upon return to the country in question.[30] Prior to the Refugee Act, withholding of deportation was completely within the discretion of the Attorney General and did not involve the "particular social group" category.[31]

22. *Id.* at 1212–13.

23. Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984); Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982). If the asylum request is made during deportation proceedings, it is also automatically considered as an application for withholding of deportation relief. INA § 243(h), 8 U.S.C. § 1253(h) (1982); Aviles-Torres v. INS, 790 F.2d 1433, 1435 (9th Cir. 1986); *see also* 8 C.F.R. 208.3(b) (1982). The difference between the two standards of proof in asylum and withholding of deportation has been clarified by INS v. Stevic, 467 U.S. 407 (1984), and INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), which outline the burdens of proof for sections 243(h) and 208, respectively. The two cases together hold that withholding of deportation (section 243(h)) and discretionary asylum (section 208) are distinct remedies with their own standards of proof. *Cardoza-Fonseca* held that the well-founded fear standard was more generous, turning in part on the subjective element of the alien's fear. 107 S. Ct. at 1212–13.

24. *See, e.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571, 1574 (9th Cir. 1986).

25. Convention, *supra* note 14, art. 33.

26. 8 U.S.C. § 1253(h) (1982).

27. *Id.* The Attorney General has the authority over most immigration matters. This authority is delegated to the Immigration and Naturalization Service (INS), which is under the umbrella of the Justice Department.

28. The statute provides that "[t]he Attorney General *shall* not deport" aliens that meet the section 243(h) criteria. INA § 243(h), 8 U.S.C. § 1253(h) (1982) (emphasis added).

29. INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987).

30. INS v. Stevic, 467 U.S. 407, 429 (1984).

31. *See* Pub. L. No. 82-414, § 243(h), 66 Stat. 163 (1952).

II. *SANCHEZ-TRUJILLO v. INS*

Sanchez-Trujillo v. INS[32] represents the first significant judicial interpretation of the term "particular social group."[33] Prior to this decision, the courts had not developed any workable tests for recognizing a social group claim.[34]

32. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986).

33. *See infra* note 34.

34. Two cases in the Ninth Circuit have addressed the "young men" social group issue in relation to conditions in El Salvador. Neither of them dealt with the meaning of "social group" as a central issue. In Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984), the court held that the petitioner's neutrality and status as a male of military age was insufficient for section 243(h) withholding of deportation. *Id.* at 289. The court in Chavez v. INS, 723 F.2d 1431 (9th Cir. 1984), held that mere status as a "young urban male" was not specific enough for section 243(h) relief. *Id.* at 1434. Both of these opinions are cited in *Sanchez-Trujillo* and distinguished as not having conclusively resolved the issue since the petitioners in those cases did not offer any specific evidence to support their "social group" claims. 801 F.2d at 1574. The impact of the difference between the burdens of proof for sections 243(h) and 208 will obviously be important here. Because the Supreme Court has now reinforced the importance of the subjectivity of the asylum applicant's fear in *Cardoza-Fonseca, see supra* notes 21–22 and accompanying text, fact situations such as the ones in *Zepeda-Melendez* and *Chavez* may be sufficient to meet the burden under section 208.

Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985), dealt with a "social group" refugee from Ghana. The court recognized the claim without developing a test for the recognition of the group. *Id.* at 628. It found that the petitioner had reason to fear social group persecution when the Ghanian government persecuted those associated with the former government, members of the Ashanti tribe, and the educated/professional class, and when "petitioner's family fell within all the categories." *Id.* The opinion does not explain whether the petitioner was considered a member of a social group with these attributes or was a member of three such persecuted groups.

The court in Fernandez-Roque v. Smith, 599 F. Supp. 1103 (N.D. Ga. 1984), remanded a series of claims concerning refugees from the Mariel boatlift back to the Board of Immigration Appeals (BIA) for consideration of social group status. The court stated that the BIA abused its discretion in denying a motion to reopen when the BIA disregarded new evidence tending to show that those who had participated in the boatlift were persecuted as a group by the Cuban government. *Id.* at 1109–10. While the court implied that this fact pattern may result in recognizing the existence of a social group, it did not set out any tests for doing so. Part of the evidence in the case included testimony from an expert on Cuba who stated that "although distinctions were plausible among Mariel Cubans, Cuba refused to make such distinctions and treated the entire Freedom Flotilla group as *'escoria'* (scum) who were to blame for Cuba's past problems and whose departure enabled Cuba to have a better future." *Id.* at 1106. This type of action underscores the role of the persecutor in the recognition of a refugee social group. *See infra notes* 100–04, 116, 124–28, 141–59, 166 and accompanying text.

The BIA has also dealt with the social group issue and, prior to *Sanchez-Trujillo,* had provided the most specific test for recognizing social group persecution. In *In re* Acosta, BIA Interim Decision no. 2986, a case involving Salvadorans, the Board defined social group-based persecution as being

> directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members to change or is so fundamental to their identities or consciences that it ought not to be required to be changed.

Id. at 3.

A. Facts

The petitioners in *Sanchez-Trujillo*[35] individually left El Salvador and entered the United States without inspection. The INS eventually apprehended them. In deportation proceedings they conceded deportability but applied for asylum under INA section 208. They presented the Immigration Judge (IJ) with evidence that the social group to which they claimed to belong was singled out for persecution by the Salvadoran government.[36] The petitioners maintained that young men, particularly in the urban working class, were suspected by the government as having guerrilla sympathies if they did not express support for the government. Suspicion was especially intense if these young men refused to join the armed forces.[37] According to the petitioners, a well-founded fear of persecution based on their membership in this social group entitled them to asylum.[38]

The petitioners presented statistics gathered by organizations such as Amnesty International showing that 67 percent of noncombatant disappearances in El Salvador were of young males, 72 percent of these young men disappearing from the urban San Salvador area.[39] Between 70 percent and 80 percent of these disappearances were at the hands of the government forces or of groups enjoying a relationship with the government.[40] The petitioners also submitted an affidavit establishing that the Salvadoran government broadcast daily announcements on radio and television labelling young men who refused military service as "subversives and communists."[41] The announcements encouraged citizens to turn in these young people to the authorities and provided a phone number for this purpose.[42]

That members of this group were persecuted was also borne out by the personal experiences of the petitioners, which were presented to the court as independently-based claims to asylum.[43] Escobar-Nieto, who avoided military service by hiding in his house during conscription raids, was later

35. Petitioners were Luis Alonzo Sanchez-Trujillo and Luis Armando Escobar-Nieto. 801 F.2d at 1571.

36. Petitioners presented 13 witnesses and 51 affidavits and other exhibits over 15 days of hearings, resulting in over 3000 pages of transcripts and exhibits. Telephone interview with Patty Blum, attorney for petitioners (Jan. 1987); *see* Anker, *Defining a Social Group,* IMMIGR. J. 15 (Jan–Mar 1983).

37. Petitioners' Brief at 11–15, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) [hereinafter Brief].

38. *Sanchez-Trujillo,* 801 F.2d at 1573.

39. Brief, *supra* note 37, at 27.

40. *Id.; see also* Anker, *supra* note 36 at 15. For other information concerning government responsibility for political murders in El Salvador, see generally reports to the United Nations Human Rights Commission on the human rights conditions in El Salvador, U.N. Doc. E/CN.4/1984/25 (1984); E/CN.4/1985/18 (1985); E/CN.4/1986/22 (1986).

41. Brief, *supra* note 37, at 13.

42. *Id.*

43. *Sanchez-Trujillo,* 801 F.2d at 1579–81; Brief, *supra* note 37, at 5–10.

abducted by government security forces, accused of being a guerrilla, and beaten.[44] Sanchez-Trujillo was singled out for detention, interrogated, searched, and threatened.[45]

In addition to basing their claims on membership in a persecuted social group, the petitioners also maintained a well-founded fear of persecution on the basis of real or imputed political opinion.[46] Despite the evidence they presented at the hearing, the IJ denied both of their claims,[47] a finding affirmed by the Board of Immigration Appeals (BIA).[48] The BIA held that Sanchez and Escobar had not established the existence of such a social group.[49] A "social group" claim to refugee status, the Board stated, must go beyond the identification of common characteristics of a statistical grouping to a showing that persecution is aimed at the group because of its identifying characteristics.[50] Sanchez and Escobar then appealed to the Ninth Circuit.[51]

B. The Ninth Circuit Court's Analysis

The Ninth Circuit Court of Appeals addressed the two facets of the petitioners' argument separately, dealing with the "social group" claim first. The court began by stating that under ordinary circumstances, membership in a persecuted social, ethnic, or religious group alone would not be a sufficient basis for withholding deportation or for granting asylum.[52] An applicant would normally have to establish at least a "reasonable probability" that he or she would be singled out for persecution.[53] The court did suggest that "under the proper circumstances" a claim based solely on group membership would be recognized.[54] The court gave the example of

44. Brief, *supra* note 37, at 6.
45. *Id.* at 10.
46. *Sanchez-Trujillo,* 801 F.2d at 1573.
47. *Id.*
48. *Id.; see also In re* Sanchez and Escobar, BIA Interim Decision No. 2996, Oct. 15, 1985.
49. BIA Interim Decision No. 2996, Oct. 15, 1985, p. 2.
50. *Id.*
51. The circuit courts of appeals have the jurisdiction to review final orders of deportation under INA § 242(b). INA § 106(a), 8 U.S.C. § 1105(a) (1982). Circuit court review is generally limited to this area only. *See* Chang Fan Kwok v. INS, 392 U.S. 206 (1968); INS v. Chadha, 462 U.S. 919 (1983). For a discussion of judicial review of immigration and asylum decisions, see generally T. ALEINIKOFF & D. MARTIN, *supra* note 6, at 560–614.
52. *Sanchez-Trujillo,* 801 F.2d at 1574.
53. *Id.* The language used by the court does not take into account the subjective element of the asylum applicant's fear. This approach may no longer be valid in section 208 cases after INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987). *See supra* notes 21–22 and accompanying text.
54. *Sanchez-Trujillo,* 801 F.2d at 1574.

Jews fleeing Nazi Germany as one in which a clear probability of persecution would be established by membership in the persecuted religious group alone.[55] The court then addressed the issues at hand.

The court used a four-part test to evaluate the petitioners' social group claim.[56] First, the cognizability of the group had to be established. Second, petitioners needed to show they were members of that group. Third, the group in question must have been the target of persecution on account of its characteristics. Finally, the court had to determine if "special circumstances" existed which warranted granting asylum on the basis of social group membership alone.[57]

The court focused on the cognizability issue in its analysis and disposed of the case on that basis.[58] It first looked to the *Handbook on Procedures and Criteria for Determining Refugee Status,*[59] promulgated by the United Nations High Commissioner for Refugees (UNHCR), for a definition of "particular social group" but did not find the *Handbook's* discussion helpful.[60] The Court ultimately relied on its own interpretation of the statutory language.[61] It found that:

> the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity.[62]

The court then cited immediate family members as a "prototypical example" of a particular social group.[63] This was contrasted with an example of a "statistical group": males over six feet tall, a group that would not qualify for asylum even if it experienced a greater than general risk of persecution.[64] The court found the social group defined by the petitioners to

55. *Id.* (quoting Hernandez-Ortiz v. INS, 777 F.2d 509, 515 n.6 (9th Cir. 1985)). Note that the reference is to the stricter standard for mandatory withholding of deportation, INA § 243(h).

56. *Sanchez-Trujillo,* 801 F.2d at 1574.

57. *Id.* at 1574–75. As a source for this last requirement, the court quoted from paragraph 79 of the *Handbook on Procedures and Criteria for Determining Refugee Status,* promulgated by the U.N. High Commissioner for Refugees, U.N. Doc. HCR/PRO/4 (1979) [hereinafter *Handbook*]. *See infra* notes 129–33, 168–72 and accompanying text.

58. *Sanchez-Trujillo,* 801 F.2d at 1575–78.

59. *Id.*

60. The Court considered a passage from paragraph 77 of the *Handbook,* which states that a particular social group "normally comprises persons of similar background, habits or social status." *Handbook, supra* note 57, at 19, para. 77. It found this to be of "little assistance in arriving at a workable definition of 'particular social group.'" 801 F.2d at 1576.

61. *Sanchez-Trujillo,* 801 F.2d at 1576.

62. *Id.*

63. *Id.*

64. *Id.* The court did not speculate on the variable of intensity in its discussion of persecution of "statistical groups." One wonders if the court would take a different position if such a group was at

be closer to this second category.[65] The evidence the petitioners initially presented was dismissed for containing conclusory statements.[66] Because the court ruled that the cognizability requirement was not met, it went no further in its analysis.[67]

The Court did mention, in a footnote, that a persecutor's perception of a segment of a society as a "social group" may play some role in the analysis, but stated that this perception would not be conclusive.[68] There is no indication, however, that the court used this concept to arrive at its conclusion.[69]

The court then went on to analyze separately the individual claims of persecution based on real or imputed political opinion. These claims were rejected on the basis of a lack of political activity on the petitioners' part and an apparently inadequate showing of individually-directed persecution.[70]

III. ANALYSIS

A. *The* Sanchez-Trujillo *Court's Evaluation of the Words "Particular Social Group" Was Too Narrow*

Sanchez-Trujillo adopted an overly restrictive view of asylum claims based on social group membership. This approach may have been fueled by

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extreme risk.

65. *Id.* at 1576–77. The court stated: "Individuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." *Id.*

66. *Id.* at 1577.

67. *Id.* The court did add some dicta concerning the potential acceptability of social group claims and the "special circumstances" requirement. *See id.* at 1575 n.4; *see also infra* notes 129–33, 167–72 and accompanying text.

68. 801 F.2d at 1576 n.7. The Court qualified the use of the persecutor's perception in identifying the group by stating that the Refugee Act

> did not comprehend "refugee" status for everyone who fears adverse treatment by a foreign government, but only when the fear of persecution is on account of "race, religion, nationality, membership in a particular social group or political opinion."[citation omitted] . . . [W]hat constitutes a "particular social group," as opposed to a mere demographic division of the population, must be independently determined through the application of the statutory term in a particular context.

Id.

69. *Id.* at 1575–79.

70. *Id.* at 1580–81. In the analysis of Escobar-Nieto's claim, *see supra* note 44 and accompanying text, the court dismissed his encounter with the security forces:

> [Although his assailants accused him of rebel group membership, there is no indication that they suspected him personally of anti-government bias or even knew who he was. The accusation appears to be simply part of their general shakedown of an unknown man they discovered upon the streets at night . . . . [T]his was merely an isolated incident . . . .

Id. at 1581.

concern that a group-founded claim might weaken the general rule in American courts that claims to persecution should be individually based.[71] The court did not, however, utilize other sources in defining the term "particular social group."[72] Without citation, it abruptly arrived at a definition apparently based on what it took to be the plain meaning of the words.[73] In effect, the court relied on the ambiguity of the words "social group" to achieve its result. Even though an accurate meaning of the term ultimately depends on the sources that the court neglected, a "plain meaning" definition can also imply a broader group than outlined in *Sanchez-Trujillo*.

The court took the words "particular" and "social" to imply "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."[74] This was further refined by the requirement of a "voluntary associational relationship."[75] Although this definition is quite narrow, the court's use of the family as a prototypical example of a social group is even narrower.

The court's standard for identifying a refugee social group and the court's example of the family conflict with one another and therefore do not provide a useful guide. The requirements of close affiliation and common interests, when taken together, may imply a voluntary associational relationship, but suggest a much broader type of group than an individual family. For example, members of the Lion's Club have a voluntary associational relationship, but the group is far from the prototype given by the court. This conflict creates confusion. Did the court mean to say that the family possesses the minimum cognizability requirements for a social group? If the family is a prototype, is it in the middle of the "social group" spectrum, and if so what is at each end? Should one infer from the family structure other guidelines for group cognizability? How much weight should they carry? The court's requirements raise more questions than they answer, and, in doing so, fail to achieve what the court purportedly set out to do.

Even taken at face value, the words "social group" do not necessarily connote the narrow parameter outlined in *Sanchez-Trujillo*. The word "social" has many shades of meaning. To the *Sanchez-Trujillo* court, it evidently implied association and interaction. A broader meaning is more appropriate. The *Oxford English Dictionary* lists one definition of the word as: "Pertaining, relating, or due to . . . society as a natural or ordinary

71. *See id.* at 1574; *infra* notes 133, 177 and accompanying text.
72. *Sanchez-Trujillo*, 801 F.2d at 1576
73. *Id.*
74. *Id.*
75. *Id.*

condition of human life."[76] Based on this definition, the words "social group" imply a recognized grouping within a society, a group that shares some common experience.[77] A voluntary associational relationship is not necessarily a factor in the makeup of such a group. Examples of this kind of social group could include students, gay people, bricklayers, or the bourgeoisie.[78] The word "particular" can simply function as singling out one of these groups for identification; it need not narrow the scope of the group being defined. Under this "plain meaning" of the term, a group of young working class men who refuse to serve in the military could be recognized as a particular social group. Few would disagree that, in the United States during the Vietnam War, young men who refused military service were looked upon as a social group of this broader type.[79]

The court did not develop a useful standard for recognizing a "particular social group" in its cognizability analysis. Consequently, it is helpful to look to international sources—the *travaux preparatoires* of the U.N. Convention and Protocol, cases from other countries party to these instruments, and the UNHCR *Handbook*—to obtain a clearer idea of the meaning of this term.

B. International Law Sources

1. The Travaux Preparatoires *of the United Nations Convention Show that the Social Group Category Was Intended To Be Flexible*

The term "particular social group" first appeared in the definition of "refugee" in the 1951 United Nations Convention Relating to the Status of Refugees.[80] Prior to the Convention, accepted definitions of refugee status

76. 2 OXFORD ENGLISH DICTIONARY 2902 (Compact ed., 1971).

77. One commentator, Arthur Helton, suggests that the term "particular social group" as intended by the drafters of the U.N. Convention encompasses four types: a demographic or statistical group (people with red hair, for example), a societal group (the type suggested in the accompanying text above), a voluntary or per se social group (crowds, congregations, play groups), and an associational group (the YWCA). According to Helton, any of these groups would meet the Convention's definition. *See* Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM HUM. RTS. L. REV. 39, 52 (1983).

78. Such a broad construction of "social group"—one that almost borders on "social class"—is seen frequently in European cases dealing with refugee social groups. *See infra* notes 107–16 and accompanying text.

79. The court may have based its narrow interpretation of the statutory language on the example of the social group identified for purposes of adequate representation on the jury venire. *See infra* notes 137–40 and accompanying text.

80. Convention, *supra* note 14; *see* Helton, *supra* note 77, at 40. The United States is party only to the Refugee Protocol. *See supra* note 14. The Protocol updates the Convention by removing the temporal and geographical limitations to the parties' obligations. *See supra* note 16 and accompanying text.

either referred to specific refugee groups or concentrated on political, religious, or ethnic persecution.[81] A study of the *travaux preparatoires* of the Refugee Convention and an understanding of the primary issues at the drafting conference reveal that the "particular social group" category was meant to protect groups and individuals that did not fall within the categories of race, religion, and political opinion. The social group classification was meant to have flexible boundaries that would enable it to perform this function.

The 1951 Convention was, in large part, a reaction to the political restructuring of Europe following World War II and the creation of the East Bloc.[82] This reaction is reflected in two important limitations that the Convention drafters added to the definition of "refugee." First, a refugee's well-founded fear must have been the result of events occurring before January 1, 1951.[83] Second, each contracting State could, at its option, limit its obligation to only those refugees fleeing conflicts in Europe.[84]

The European geographic limitation was the main source of controversy during the drafting of the definition of "refugee."[85] Those States in favor of the limitation, typified by France, maintained that without it, European nations could be flooded with non-European refugees.[86] Other States, exemplified by the United Kingdom, favored a less limited and more global

81. The first generalized definition of the term "refugee" was developed by the Inter-Governmental Committee on Refugees (created to deal with refugees from Germany) in 1938. The IGCR defined refugees as persons "who must emigrate on account of their political opinions, religious beliefs or racial origin." The concept of a "well-founded fear" of persecution was first articulated in the Constitution of the International Refugee Organization (an organization created by the United Nations) in 1946. For a full discussion of the development of the definition of "refugee" in international law, see Kahn, *Legal Problems Relating to Refugees and Displaced Persons*, 149 RECUEIL DES COURS 287 (1976); Van Heuven Goedhart, *The Problem of Refugees*, 82 RECUEIL DES COURS 260 (1953). Both of these writers had served as the U.N. High Commissioner for Ref ees.

82. *See, e.g.*, Carlin, *Significant Refugee Crises Since Worl War II and the Response of the International Community*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, *supra* note 14, at 3.

83. Convention, *supra* note 14, art. 1 § A(2).

84. *See id.* art. 1 § B(2):

> For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A [*see supra* note 15 and accompanying text] shall be understood to mean either
> (a) "events occurring in Europe before 1 January 1951"; or
> (b) "events occurring in Europe or elsewhere before 1 January 1951";
> and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

85. *See generally* U.N. Documents A/CONF.2/SR.2, 3, 19–24 (1951) (summary records of the Conference meetings involving the definition of "refugee").

86. *See, e.g.*, A/CONF.2/SR.3 at 10–14, SR.19 at 11. This was a central concern to those States that already had taken in large numbers of refugees following the war. France, for instance, was sheltering many refugees who had escaped the Civil War in Spain. A/CONF.2/SR.19 at 7. The geographic limitation was also favored by small countries unable to deal with large groups and countries outside of Europe wishing to minimize their obligations. *See, e.g.*, A/CONF.2/SR.19 at 7–13, 25.

instrument.[87] The delegation from the Holy See saved what may have been a deadlocked conference by proposing that the geographic limitation be made optional.[88]

Into this atmosphere, the Swedish delegation introduced the notion of social group-based persecution to add a further dimension to the definition of "refugee."[89] The Swedish representative maintained that such cases existed and that the Convention should mention them explicitly.[90] The conference records contain no discussion from other delegations that might further illuminate the meaning of "particular social group,"[91] but the lack of comment indicates that this new category presented little controversy.[92] It appears that the drafters were less concerned with limiting their recognition of the *bases* for persecution than with restricting the scope of their obligations to specific events and geographic areas that produced refugees.[93]

Sweden's position in the geographic limitation debate demonstrates that the term "social group" was meant to have a broad application. The Swedish delegation, although not an adamant proponent, was willing to agree to the limitation.[94] Apparently this limitation did not alter the delegation's conception of "social group" because the Swedes continued to maintain that "such cases existed."[95] If the Swedes' notion of social group persecution was not changed by limiting the Convention to refugees from Europe, then the examples they had in mind of this type of persecution must have come from European events before 1951. Otherwise, if the social groups they sought to protect had been outside of Europe, the Swedes undoubtedly would have opposed the geographic limitation. The most

87. A/CONF.2/SR.19 at 17–19.

88. A/CONF.2/SR.23 at 4. The Holy See's measure was adopted by 22 votes to none, with one abstention. *Id.*

89. A/CONF.2/SR.3 at 14. The Swedish representative, Sture Petren, stated in introducing the category:

> [E]xperience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should be accordingly included.

Id.

90. A/CONF.2/SR.19 at 14.

91. *See, e.g.*, A/CONF.2/SR.19–24.

92. That the new category raised little concern or wariness is reflected in the voting on its inclusion in Article 1: it passed by fourteen votes to none with eight abstentions. A/CONF.2/SR.23 at 8. There is no indication in the summary records as to which delegations abstained. None of the delegations commented on this vote. Article 1, with this new definition, passed as a whole by twenty-two votes to none with one abstention. *Id.* at 10.

93. *See, e.g.*, A/CONF.2/SR.19–24.

94. A/CONF.2/SR.19 at 13.

95. *Id.* at 14.

well-known examples of social group-based persecution at this time occurred in Eastern Europe following the rise of the Communist regimes.[96] Subsequent cases from European courts of nations party to the Convention have recognized, for example, the "capitalist class" and "independent businessmen" and their families as valid social groups in granting refugee status to persons fleeing Eastern Europe.[97] Examples such as these are probably what the Swedes had in mind.[98]

The Swedish delegation's position shows that the "particular social group" category was intended to insure that the Convention would protect persecuted groups of people outside of the bounds of ethnic, religious, or political identity. If the Swedes referred to groups such as capitalists and independent businessmen, then this delineation would suggest groups with wider parameters than outlined in *Sanchez-Trujillo*.[99] A voluntary associational relationship would not be a necessary factor in such a group.

In this European example, groups of capitalists and independent businessmen could have been seen as a threat or a vestige of the old order to the new Communist governments. Thus, the perception of the persecutor, in this case the Communists, is an important factor in the group cognizability analysis. If group members are persecuted on the basis of their unifying characteristics, such as being capitalists or young men refusing to serve in the military, then these characteristics should be sufficient to identify the group.[100]

An analysis making use of the persecutor's perception is reflected in the BIA and Ninth Circuit decisions of *Sanchez-Trujillo* by the requirement that the persecution of the group must be on account of its identifying characteristics (the third step in the four-part test).[101] However, instead of

96. *See* 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 164, 185–86 (1968).

97. *See infra* notes 107–16 and accompanying text.

98. The Swedish delegation, and perhaps others as well, must have felt that the "social group" category was self-explanatory. In an earlier speech, Mr. Petren stressed the need for unambiguous language: "[I]t was . . . essential that the text should be as clear as possible, since in its interpretation of any convention the International Court of Justice could only take into account its actual text, not what had been said during the preparatory work without finding expression in the text." A/CONF.2/SR.19 at 13.

99. *See supra* notes 58–67 and accompanying text.

100. Other commentators have also developed the idea of persecutor-based group definition. *See, e.g.*, G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW (1983); A. GRAHL-MADSEN, *supra* note 96, at 181–82; Helton, *supra* note 77. Goodwin-Gill suggests that the identity of a group "may well be in proportion to the notice of it taken by others, particularly the authorities of the State. The notion of social group thus possesses an element of open-endedness which States, in their discretion, could expand in favor of a variety of different classes susceptible to persecution." G. GOODWIN-GILL, *supra*, at 30.

101. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575 (9th Cir. 1986); BIA Interim Decision No. 2996 at 2; *see supra* note 57 and accompanying text.

allowing the characteristics that "invite" persecution to have a major role in identifying the group, the *Sanchez-Trujillo* court performed the cognizability analysis in a vacuum.[102] This led to a model based solely on the internal characteristics of the group, such as the "voluntary associational relationship."[103] The court acknowledged the importance of the persecutor's perception, but did not use it.[104] While internal cognizability is important in group definition,[105] its use in *Sanchez-Trujillo* departs from the standards that originated in the Convention and its *travaux preparatoires*.[106]

2. *Social Group Cases from European Courts*

A few European countries which are party to the Convention and Protocol have developed case law concerning the Convention language "particular social group." These cases are generally sketchy about the means for identifying a social group, but are informative in that they show a broad and flexible application of the concept of social group in the refugee context.

Most of these cases come from West German courts and deal with refugees from Eastern Europe. In *Case 2531 II/56* (15 January 1957),[107] the *Bayerisches Verwaltungsgericht* (administrative court) in Ansbach identified a textile manufacturer and dealer as a member of a social group made up of similar people. The "social group of independent businessmen" is referred to in *Case 3008 II/57* (25 November 1957).[108] In *Case 2053 II/55* (4 February 1957),[109] the court dealt with a refugee from Hungary, finding that, as a "former large property owner," the plaintiff had a well-founded fear of persecution at the hands of the Communists when he experienced persecution similar to that of others in the wealthy class.[110]

In the *Refugie Sur Place Case* (1966),[111] the Federal Supreme Court of the Federal Republic of Germany denied recognition of refugee status when the plaintiff claimed a fear of returning to Poland after World War II

102. *Sanchez-Trujillo*, 801 F.2d at 1576–77; *see supra* notes 57–69 and accompanying text.
103. *Sanchez-Trujillo*, 801 F.2d at 1576.
104. *Id.* at 1576 n.7, 1577.
105. *See infra* notes 148–59 and accompanying text.
106. *See infra* notes 134–38 and accompanying text.
107. Cited in GRAHL-MADSEN, *supra* note 96, at 219.
108. *Id.*
109. *Id.* at 185.
110. *Id.* This is a paraphrase of the original German which reads: "Als ehemalinger Grossgrundbesitzer musste der Anfechtungsklager beim Einmarsch der Russen in Ungarn im Marz 1945 damit rechnen, dass ihn das gleiche Schicksal ereile, wie viele andere Beguterte schon vorher." *Id.*
111. 57 I.L.R. 324, FONTES IURIS GENTIUM Series A, Secto II, Tomus 6, p. 124 (RZW 1966).

on account of membership in the "capitalist class." Nevertheless, in dismissing the claim, the court revealed that capitalists and tradespeople constituted valid social groups.[112]

One case from Switzerland, *Grundul v. Bryner & Co., G.M.B.H. and Richteramt III Bern,*[113] also recognized a social group claim, but did not specifically delineate the parameters of the group. The plaintiff was a Latvian employed in the Marine Customs Office in Tien-Tsin, China. He resigned his post and fled when the Chinese Communists took power.[114] The court recognized his refugee status on a number of grounds, among them being membership in a persecuted social group. [115]

These European cases show that the social group is a flexible concept to be used to fill definitional gaps when persecution is directed at a segment of a society that does not fit into racial, religious, national, or political categories. For instance, the European decisions frequently utilize economic and class factors in the recognition of social groups, even when there is no "economic" language associated with "particular social group" in the Convention.[116] The European cases do not present hard-and-fast tests for determining cognizability. Instead, their examples demonstrate that the common characteristics of the group that were the target of persecution played a significant role in the courts' cognizability decisions. In this way, the cases also serve as an example of allowing the perceptions and actions of the persecutor to illuminate the cognizability step in the social group analysis.

3. *The Guidelines from the UNHCR* Handbook *Stress Flexibility in the Use of the Social Group Category*

The *Handbook*[117] promulgated by the UNHCR further clarifies the identification and use of the "social group" category. The guidelines in the *Handbook* stress flexibility, as well as the importance of the perception of

112. 57 I.L.R. at 326. The court indicated a willingness to recognize capitalists as a valid social group, but found that the plaintiff, a tailor's wife, belonged instead to the social group of craftsmen and tradesmen. The court then found that this group to which the plaintiff did belong was not subject to persecution. *Id.*

113. 24 I.L.R. 483 (Switzerland, Bundesgericht, 27 March 1957).

114. *Id.* at 485.

115. *Id.* In this case, the plaintiff was not seeking entry into Switzerland; he had been granted asylum in Norway through the International Refugee Organization in 1955. His purpose in establishing refugee status in Switzerland was to avoid posting a bond (as a person without a nationality) in order to bring a separate suit in the Swiss courts. *Id.* at 483.

116. *See, e.g.*, Convention, *supra* note 14, art. 1 § A(2), quoted in text accompanying *supra* note 15.

117. *Handbook, supra* note 57.

the persecutor, in the identification of refugee social groups. The *Handbook* also reveals a two-sided approach to the "special circumstances" requirement cited in *Sanchez-Trujillo*.

The *Handbook* was developed to assist parties to the Convention and Protocol in determining refugee status.[118] It draws from the experience accumulated by the High Commissioner's Office, as well as the practices of contracting States, since the Convention came into force in 1954.[119] The *Handbook* is frequently cited by United States courts in asylum cases.[120]

The *Handbook* states that a social group "normally comprises persons of similar background, habits or social status."[121] These internal factors[122] should form the starting point for determining cognizability, and represent the first step of the *Sanchez-Trujillo* test.[123] The phrase contains some useful language. The word "similar" connotes some flexibility in that the characteristics mentioned do not have to be *identical*. The use of the word "or" makes clear that any one of the characteristics would be sufficient to identify a social group. The word "normally," as pointed out by one commentator, suggests that the three listed characteristics are not exclusive.[124] This again suggests a wide range of identifying parameters, one that allows leeway for "persecutor-based" group identification.

The importance of the role of the persecutor is strengthened by paragraph 78 of the *Handbook*:

> Membership in a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.[125]

The words "no confidence in the group's loyalty to the Government" suggest both an objective sense of confidence as well as how the group's loyalty appears subjectively "to the Government." The actual loyalty of the group may be different from what the government perceives it to be. As a

118. *Id.* at 1, paras. v–vi.
119. *Id.*
120. *See, e.g.*, Damaize-Job v. INS, 787 F.2d 1332 (9th Cir. 1986); Hernandez-Ortiz v. INS, 777 F.2d 509, 514 n.3 (9th Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984); McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981), *rejected by* Marroquin-Marniquez v. INS, 699 F.2d 129 (3d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).
121. *Handbook, supra* note 57, at 19, para. 77.
122. *See infra* notes 137–40 and accompanying text.
123. *See supra* note 57 and accompanying text.
124. Helton, *supra* note 77, at 47.
125. *Handbook, supra* note 57, at 19, para. 78.

result, the group may be persecuted for opinions which the government attributes to it but which may not exist in fact.

The guidelines in paragraph 78 apply to situations such as that in *Sanchez-Trujillo*: the Salvadoran government had no confidence in the loyalty of young urban men who had not joined the military and saw them as an obstacle to government policies.[126] The government's perception is an external factor which goes toward identifying the group; it is embodied in the third step of the *Sanchez-Trujillo* test.[127] The guidelines in the *Handbook,* then, point toward using both the first and third steps in the *Sanchez-Trujillo* test for determining cognizability, and suggest a flexible use of the first step.[128]

The fourth step of the *Sanchez-Trujillo* test is taken from paragraph 79 of the *Handbook.* This paragraph states that, barring "special circumstances," social group membership alone "will not normally be enough" to base a refugee claim.[129] This guideline should be read in conjunction with a passage in paragraph 77 which states: "A claim to fear of persecution [on account of membership in a particular social group] may frequently overlap with a claim to fear of persecution on other grounds."[130] If this overlap of bases for persecution exists, then it is not necessary to determine the presence of "special circumstances" because the claim would no longer be based solely on social group membership.[131] In *Sanchez-Trujillo,* despite the fact that the petitioners were claiming social group-and political opinion-based persecution,[132] the court treated their claims as separate items to be disposed of one at a time instead of two parts of a larger whole.[133]

126. *See, e.g.,* Brief, *supra* note 37, at 11–15.

127. *See supra* note 57 and accompanying text.

128. *Id.; see also infra* notes 160–72 and accompanying text.

129. *Handbook, supra* note 57, at 19, para. 79.

130. *Id.* at para. 77.

131. *See infra* notes 175–77 and accompanying text.

132. *See supra* notes 46, 70 and accompanying text.

133. *Id.* Another section of the *Handbook,* not mentioned by the court, states that all of the components of a well-founded fear

> need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.

Handbook, supra note 57, at para. 43. This gives further strength to the social group-based theory in general and also suggests a relaxation of the individually-based persecution requirement in United States asylum law. The reliance on the individual model may stem from a confusion about the purposes and requirements of mandatory section 243(h) (*non-refoulement*) relief—with its "clear probability of persecution" based on individual experience—and the discretionary grant of asylum under section 208, which is based solely on refugee status. While United States courts have assumed that refugee status must also be proven on the basis of individual experience, the *Handbook* suggests that some leeway should be given in this requirement. Leeway is also suggested by INS v. Cardoza-Fonseca, 107 S. Ct.

The *Handbook* references, taken together, point toward more flexibility in identifying persecuted social groups, as well as a two-step approach in the "special circumstances" requirement. A group of young, urban working class men who are suspected of subversion because of their neutrality and their refusal to join the military and who are persecuted because of it would appear to fall within the contours of a social group as outlined in the *Handbook*.

C. *Underlying Policies in Determining the Cognizability of Groups in Municipal Law*

While the international sources emphasize the flexibility of a "particular social group" and the importance of the persecutor's perception in a group's identification, an examination of domestic law concerning social groups yields more grist for the analytical mill. A brief survey of this area shows that the standard used in determining a group's cognizability relates to the underlying purpose for identifying that group. The *Sanchez-Trujillo* standard for cognizability—the existence of a "voluntary associational relationship," an internally-defining factor[134]—has no origin in the U.N. Convention or Protocol.[135] This standard is more appropriate for identifying other types of groups, such as cognizable social groups on the jury venire.[136] The following section analyzes the cognizability requirements of different types of cases in which group cognizability is an issue. Many of these cases show that there is a basis for a "persecutor-based" or external model in American law.

1. *Internally-Defined Groups*

An internally-defined social group is one which derives its identity from the unity or cohesion within the group, from relatively strong bonds of commonality.[137] An example of a group of this type appears in sixth amendment challenges to the jury venire. If a cognizable social group is held to be missing from the venire, the right to fair representation on the jury may be infringed. When the representation of the cross-section of

1207 (1987), with its emphasis on the subjective element of a refugee's fear. *See supra* note 23. Although it is not clear exactly how much can be missing in the way of individual persecution, it is conceivable that a claim based upon social group membership that is corroborated by some personal experience would meet this *Handbook* guideline.

134. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

135. *See supra* notes 80–106, 117–33 and accompanying text.

136. *See infra* notes 137–40 and accompanying text.

137. *See, e.g.*, Brief, *supra* note 37, at 18.

community views and attitudes in the venire is at issue, courts will look for internally-unifying characteristics, often in the form of commonly-held beliefs, of the excluded groups.

As outlined in *United States v. Potter,* a social group on the venire must be distinct from society as a whole and must have interests that cannot be represented by others.[138] Internal cohesion within the group is an important factor.[139] *United States v. Guzman* cites the need for a "community of interests" and common views, attitudes, or experiences.[140]

The logic of the internally-defined groups can be seen in the example of the venire. When the purpose for identifying a group is to make sure that its unique points of view are represented, it must be shown that the group *has* unique points of view based on its group experience. The internally-unifying characteristics that give rise to a common point of view are important in this context.

2. *Externally-Defined Groups*

An externally-defined group is one that is largely identified by the perceptions of those outside of it.[141] The group may have particular points of view or customs, but it is found to be cognizable because circumstances external to it have isolated it from the rest of society.[142]

An example of this type of group identification, which strikingly parallels asylum, can be found in a number of cases construing the "class-based discriminatory animus" requirement in civil rights conspiracy claims under 42 U.S.C. § 1985(3), also known as the Ku Klux Klan Act.[143] A

138. 552 F.2d 901, 904 (9th Cir. 1977).

139. *Id.*

140. United States v. Guzman, 337 F. Supp. 140, 145 (S.D.N.Y.), *aff'd,* 468 F.2d 1245 (2d Cir. 1972), *cert. denied,* 410 U.S. 937 (1973). The process of internal identification, as well as the underlying reasons for it, are perhaps best summed up in *In re* Rhymes (People), 170 Cal. App. 3d 1100, 217 Cal. Rptr. 439 (1985):

> A "distinctive" group of citizens . . . share a common perspective gained precisely because of membership in that group, which perspective cannot be adequately represented by other members of the community.

Id. at 444.

141. *See, e.g.,* Brief, *supra* note 37, at 18–19.

142. *Id.*

143. Act of Apr. 20, 1871, ch. 22 § 2, 17 Stat. 13 (1871). The statute reads in relevant part:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of its conspirators.

42. U.S.C. § 1985(3) (1982).

good example is *Hobson v. Wilson,*[144] in which the District Court for the District of Columbia ruled that the Federal Bureau of Investigation and various police departments had conspired to violate the rights of civil rights activists and groups opposed to the Vietnam War. In determining the contours of the class requirement, the court stated that the racial identity of the class was irrelevant.[145] The defining factor lay in the actions of the conspirators themselves and in the singling out of the class for discrimination.[146]

144. 556 F. Supp. 1157 (D.D.C. 1982), *aff'd in part,* 737 F.2d 1 (D.C. Cir. 1984), *cert. denied sub nom.* Brennan v. Hobson, 470 U.S. 1084 (1985).

145. 556 F. Supp. at 1167.

146. *Id.* The court stated: "[I]t is the agreement *vel non* among the alleged conspirators to single a particular group or class for discriminatory interference with constitutional rights that should itself define the class . . . ." *Id.*

The broader construction of the class requirement of section 1985(3) has its roots in Griffin v. Breckenridge, 403 U.S. 88 (1971), which extended the statute's application to private conspiracies not involving state action and held that "there must be some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. Since *Griffin,* lower courts have experimented with the contours of section 1985(3), some of them echoing a "persecutor's perception" analysis. *See, e.g.,* Scott v. Moore, 640 F.2d 708 (5th Cir. 1981) (non-union workers and their employers victims of discriminatory class-based animus), *rev'd sub nom.* United Brotherhood of Carpenters v. Scott, 463 U.S. 825 (1983) ; Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) (female faculty members); Means v. Wilson, 522 F.2d 958 (8th Cir. 1975) (Indian supporters of a political candidate), *cert. denied,* 424 U.S. 958 (1976); *see also* Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 719 n.15 (9th Cir.) (listing many such cases), *cert. denied,* 454 U.S. 967 (1981). A broad reading of the class requirement is supported by a statement made by the floor manager of the original bill, Senator George Edmunds of Vermont, before its passage in 1871:

> We do not undertake in this Bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Methodist, or because he was a Catholic, or because he was a Vermonter, . . . then this section could reach it.

CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871).

Recently, courts have attempted to define stricter limits to the class requirement of section 1985(3) and have rejected many claims as being beyond the scope of the section. This trend especially disfavors claims based on economic or commercial factors. *See, e.g.,* United Brotherhood of Carpenters v. Scott, 436 U.S. 825 (1983) (reversing the circuit court decision noted above, rejecting the use of economically and commercially-based classes, and also, in dicta, expressing doubt about the statute's applicability to non-racial, politically motivated conspiracies); Roe v. Abortion Abolition Society, 811 F.2d 931 (5th Cir. 1987) (patients, doctors, and abortion clinic staff did not form a class); Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) (employees who work overtime not a class); Schultz v. Sundberg, 759 F.2d 714 (9th Cir. 1985) (members of state legislature not a class when compelled to attend joint legislative session). For a discussion of this limiting trend, see generally Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?,* 84 MICH. L. REV. 88 (1985).

Petitioners, in their brief, cited a different example of an externally-defined group, found in certain jury venire cases. Brief, *supra* note 37, at 19 n.6. An important case of this type was Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), which found daily wage-earners that were routinely excluded from the venire to be a cognizable group. This cognizability was founded on the act of exclusion itself, largely an externally-defining factor. *Id.* at 223-24.

Hobson serves as a valid example of "persecutor-based" group definition in domestic American law. While the "group" language in section 1985(3) is different from that of the Refugee Act,[147] the underlying purposes for identifying the groups are notably similar. Both situations deal with an external agent interfering with the rights or safety of the group. Both groups are properly identified by giving external factors a major role in determining cognizability. Both cases exemplify the logical way of identifying the group when the underlying purpose for doing so is to protect that group.

3. *The Proper Basis for Identifying a Particular Social Group in the Refugee Context Relates to Underlying Purpose*

The previous examples show that different types of groups can be identified for different purposes. An excessive reliance on the internally-defined group model, embodied in the first step of the *Sanchez-Trujillo* test,[148] is inappropriate in the refugee context. The purpose behind recognizing a refugee social group is not to ensure the adequate representation of a point of view but to give haven to group members who have a well-founded fear of being persecuted on the basis of perceived group characteristics. While the language of the Refugee Act[149] does imply that the group should have more than a demographic identity, the guidelines for internal definition, as put forth in the *Handbook*,[150] should be flexible.[151]

That external factors, such as the persecutor's perception, should be stressed in the refugee context is also suggested by an important line of Ninth Circuit precedent generated by *Bolanos-Hernandez v. INS*.[152] The court in *Bolanos-Hernandez* recognized neutrality in the Salvadoran conflict as a legitimate political opinion for the purposes of the definition of "refugee" in the Refugee Act.[153] Additionally, *Bolanos-Hernandez* held that the asylee's motives in adopting the neutral position are irrelevant for the purposes of determining refugee status.[154] A more recent case in this line, *Aviles-Torres v. INS*,[155] developed the neutrality issue further by

147. *Compare supra* note 7 *with supra* note 143.

148. *See supra* note 57 and accompanying text.

149. *See supra* note 7.

150. *Handbook*, *supra* note 57, at para. 77.

151. *See supra* notes 117–33 and accompanying text.

152. 767 F.2d 1277 (9th Cir. 1985).

153. *Id.* "When a person is aware of contending political forces and affirmatively chooses not to join any faction, the choice *is* a political one." *Id.* at 1286; *see also supra* note 7.

154. *Id.* at 1287; *see also* Del Valle v. INS, 776 F.2d 1407 (9th Cir. 1985); Argueta v. INS, 759 F.2d 1395 (9th Cir. 1985).

155. 790 F.2d 1433 (9th Cir. 1986).

recognizing refusal to join the Salvadoran armed forces as one factor which would make a person a "prime target" for government retribution.[156]

By disregarding the asylee's motives in the analysis, *Bolanos-Hernandez* implies that the role of the persecutor is significant in determining refugee status: the government's perception of the asylee's neutrality as a threat becomes the basis for persecution. Applied to a *group* of neutral people such as the one in *Sanchez-Trujillo,* the *Bolanos-Hernandez* approach suggests that it does not matter whether the members of the group hold subversive opinions or not, only that the persecutor believes they do.[157]

A close associational relationship within a social group that would give rise to a common point of view is not necessarily important in the refugee context. Although social groups may be persecuted on the basis of points of view attributed to them, it is not important that this point of view *actually* exist. Persecution is often not rationally based.[158] Should we recognize only those cases of social group persecution that have an "objective" basis in fact? One commentator describes the social group category as one intended to cover "all the bases for and types of persecution which an imaginative despot might conjure up."[159] In the face of such possibilities, a cognizability test containing a flexible "internal" identification requirement informed by the prevailing "external," or persecuting, realities is the most appropriate.

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156. *Id.* at 1436. When Aviles-Torres had travelled to his hometown in El Salvador (after being deported by the INS), "he found that many of his friends, young men who had refused to join the government forces, had been banished, murdered, or simply had disappeared. . . . [S]ince he had not enlisted, he automatically became considered a subversive in the government's eyes . . . ." *Id.* at 1435. This situation, in addition to being publicly labelled subversive by the government—apparently due to his neutral stance—was sufficient to grant him section 243(h) relief. *Id.*

157. The point that it makes no difference whether the persecuted group holds the imputed political opinions or not is made explicitly in Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985). The court stated:

> A government does not under ordinary circumstances engage in political persecution of those who share its ideology, only those whose views or philosophies differ, at least in the government's perception. It is irrelevant whether a victim's political view is neutrality, as in *Bolanos-Hernandez,* or disapproval of the acts or opinions of the government. Moreover it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does. . . . When . . . an alien establishes a *prima facie* case that he is likely to be persecuted because of the government's belief about his views or loyalties, his actual political conduct, be it silence or affirmative advocacy, and his actual political views, be they neutrality or partisanship, are irrelevant; whatever the circumstances, the persecution is properly categorized as being "on account of . . . political opinion."

Id. at 517.

158. *See, e.g.,* GOODWIN-GILL, *supra* note 100, at 26–38 ("Reasons for Persecution").

159. Helton, *supra* note 77, at 45.

D. *The* Sanchez-Trujillo *Four-Step Test Should Be Modified*

The four-part test developed in *Sanchez-Trujillo*[160] is a useful tool for analyzing a social group claim. Nevertheless, the court applied the test too restrictively. Too much emphasis was placed on the first step dealing with cognizability;[161] that is, the court stressed internal over external cognizability factors. Although the first step of the test may have been emphasized in order to limit group-based claims, the "special circumstances" step of the test[162] would serve as a more appropriate limiting principle.

The internal cognizability portion of the test should remain flexible.[163] The reliance on internal factors such as a "voluntary associational relationship" results in an overly narrow standard, one inappropriate for identifying social groups of refugees.[164]

A more appropriate way of determining cognizability in the refugee context would be to use the first step of the test[165] in conjunction with the third,[166] creating a double-pronged, full-dimensional analysis. The first step should be used as a baseline for determining cognizability. The flexibility suggested by the *travaux* of the Convention and the language of *Handbook* paragraph 77—"similar background, habits or social status"—should be the primary guidepost. The third step can then give a further dimension to the inquiry: if one of the group's unifying "first step" characteristics invites persecution, this characteristic should be enough to give the group cognizability for the purposes of refugee status. Instead of looking at the steps in isolated sequence, as done by the *Sanchez-Trujillo* court, step three should be used to augment the basic internal cognizability requirement with the external element of the persecutor's perceptions and actions.

A more appropriate way of weeding out weak social group claims would be to place more, or at least equal, emphasis on the last step in the test: the one that calls for the existence of "special circumstances" for a claim to be recognized on the basis of social group membership alone.[167] This requirement is taken from paragraph 79 of the UNHCR *Handbook*.[168] Exactly

160. The four steps are: One, the identification of a cognizable group; two, showing that the asylum applicant is a group member; three, proof that persecution is aimed at one of the group's unifying characteristics; and four, the presence of "special circumstances" that merit the recognition of a solely group-based claim. *See supra* note 57 and accompanying text.

161. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575 (9th Cir. 1986).

162. *See supra* note 57 and accompanying text; *see also supra* note 160.

163. *See supra* notes 148–59 and accompanying text.

164. *Id.*

165. *See supra* note 57 and accompanying text; *see also supra* note 160.

166. *See supra* note 57 and accompanying text; *see also supra* note 160.

167. *See supra* note 57 and accompanying text; *see also supra* note 160.

168. *Handbook, supra* note 57, at para. 79. *See supra* notes 129–33 and accompanying text.

what is meant by "special circumstances" is not stated in the *Handbook*, nor is its meaning clarified by the courts that have cited it.[169] Factors conceivably qualifying as "special circumstances" could be a historical pattern of persecution of the group[170] or a recent shift in the balance of power making the group vulnerable to the new regime.[171] "Special circumstances" may also exist when the case simply shocks the conscience of the decisionmaker.[172]

The "special circumstances" step of the *Sanchez-Trujillo* test also has another side to it.[173] If a different basis for persecution coexists with the membership in the social group,[174] then the "special circumstances" need not be met because the claim would not be based on "mere membership."[175] The UNCHR *Handbook* recognizes that social group persecution frequently overlaps with other bases for persecution.[176] The fourth prong of the test should be taken to mean that social group persecution must either involve "special circumstances" or must overlap with other forms of persecution. A greater or equal reliance on this step in the test would be a more reasonable way of making sure that a "mere demographic division" of a given society is not given refugee status on the basis of being a "particular social group."[177]

169. *See, e.g.*, Zepeda-Melendez v. INS, 741 F.2d 285, 290 (9th Cir. 1984); Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984); Martinez-Romero v. INS, 692 F.2d 595, 595–96 (9th Cir. 1982); *see also* Helton, *supra* note 77, at 61–63; Blum, *supra* note 3, at 353–54.

170. The persecution of Jews, although they did not form a social group per se, serves as an example of this type of "special circumstance."

171. *See, e.g., supra* notes 107–16 and accompanying text (European cases dealing with capitalist class refugees).

172. *See supra* note 159 and accompanying text.

173. *See supra* notes 129–33 and accompanying text.

174. Political opinion probably would be the most common example of an overlapping basis for persecution. *See supra* notes 132–33, 153–57 and accompanying text.

175. *Handbook, supra* note 57, at para. 77, 79.

176. *See supra* notes 129–33 and accompanying text.

177. Another problem in *Sanchez-Trujillo* has to do with the court's treatment of this case as a general *group*-(as opposed to *social* group-) based claim to discretionary asylum. The basic rule is that mere membership in a persecuted group is not enough, that the well-founded fear of persecution must be based on individual experience. While the court was concerned with preserving the integrity of this rule, it did leave open the possibility for a completely group-based claim. The problem is that *Sanchez-Trujillo* was not such a case; the petitioners did back up their group claim with individual experiences. Their experiences should properly be seen as manifestations of the persecution of the social group in which they were members. Instead of viewing the situation as a whole, the court analyzed the group and individual claims separately, not allowing the one to inform the other. The individual persecution was dismissed as isolated or coincidental. In this respect, the court's approach here resembled its treatment of the cognizability issue: each step of analysis was isolated from the others so that the interaction of elements could not come into play.

E. Application of the Revised Test to the Facts of Sanchez-Trujillo

The *Sanchez-Trujillo* court would have probably reached a different result if it had used its test in a more holistic way. A balanced application of the test to the facts of the case may show how the Refugee Act was meant to be applied. The first prong of the cognizability step could be satisfied by a number of factors. The urban working class identity of the group goes directly to "similar social status." The age of the group serves as another societal factor in its isolation. What is more telling, however, is the commonly-held neutral political stance of the group members, especially as manifested by refusal to join the government military forces. This characteristic is a pivotal one, for it is the focus of the persecutor.[178] If the government perceives the group to be subversive because of its neutrality and refusal to join the military and persecutes the group members on the basis of that perception, then step three of the test is met. The characteristic of neutrality is not only internally unifying, but it is a catalyst: it invites persecution. In determining cognizability, characteristics that make the group a target for persecution should be the deciding factor.

In the application of the "special circumstances" fourth step, *Bolanos-Hernandez* comes into play.[179] Because one of the unifying characteristics of the social group in *Sanchez-Trujillo* was political neutrality, it would follow that, according to the *Bolanos-Hernandez* rule,[180] there was an essential political element to the claimed persecution of the group. This would result in an overlap of bases of persecution—social group and political opinion—and would obviate the need for determining whether or not the "special circumstances" were present.

IV. CONCLUSION

Sanchez-Trujillo v. INS could be looked upon as a case which simply interpreted a lesser-used classification in relatively new legislation. If that were the complete picture, then the court would have been doing well, in the absence of clear domestic legislative history, to construe the "particular social group" language as it did. *Sanchez-Trujillo* is, of course, more than a simple case of statutory interpretation. The Refugee Act is a special piece

178. *See, e.g.*, Brief, *supra* note 37, at 11–15.

179. Although *Bolanos-Hernandez* was cited in *Sanchez-Trujillo*, reference was made only to standards of administrative review articulated in that opinion. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1578 (9th Cir. 1986). Its holding mentioned above was ignored. *Bolanos-Hernandez's* import did not bear directly on the *Sanchez-Trujillo* court's handling of the case—no determinative analysis was made past the cognizability step. It would have only if the four-part test had been used in a balanced fashion. *See supra* notes 160–77 and accompanying text.

180. *See supra* notes 152–54 and accompanying text.

of legislation which codifies into domestic law an international human rights commitment. Congress intended that the Act include language which originated in the Refugee Convention and Protocol, language which reflects the intent of the drafters of those instruments. By not giving this background of the Refugee Act enough consideration, the *Sanchez-Trujillo* court essentially belittled the commitment that the Act embodies.

A look at the *travaux preparatoires* of the Convention and Protocol, and at interpretive materials such as the UNHCR *Handbook,* reveals that the "social group" category was intended for a specific purpose. It was meant to insure that groups of individuals who shared common social characteristics and might be the target of persecution, but did not fit into classifications such as race, religion, or political opinion, would not be left unprotected. When seen in this light, the notion of a "social group" takes on a special meaning; it is a classification that can only be understood in the context of recognizing refugee status, and therefore is intimately linked with its purpose.

Sanchez-Trujillo did leave the Ninth Circuit with a useful tool: a four-part test for considering a social group claim. A balanced use of this test, one allowing for interplay between the different steps, would enable a court to recognize such a claim in a manner consistent with the purpose of the social group category. This approach would more accurately reflect the nature of United States commitments under the Refugee Protocol and would also be more in keeping with our country's long-standing tradition of protecting human rights.

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